approximately seventy-five feet away into Deer Creek, a nonnavigable watercourse that flows into the Lemonweir River, also non-navigable. *Id.* at B-3 to B-4. The Lemonweir runs to the Wisconsin River, a navigable waterway, which empties into the Mississippi River. *Id.* at B-4.

At the direction of the owner, Gerke removed stumps and topsoil and filled in and graded part of the property using a bulldozer and trucks. *Id.* at B-6. The next day, the Corps issued cease and desist orders against Gerke and Peter Thorson, president of Managed Investments. *Id.* at B-8. These were hand-delivered the following day. *Id.* at B-8. The Respondent United States (United States or government) subsequently brought this action for injunctive and monetary relief against Gerke, Mr. Thorson, and Managed Investments. The district court granted summary judgment to the United States. *Id.* at B-35. On appeal, the Seventh Circuit affirmed. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 808 (7th Cir. 2005), *reprinted in* App. A at A-7.

The CWA prohibits discharges of "fill" material into "navigable waters" unless permitted by the federal government. *See* 33 U.S.C. §§ 1311(a) and 1344(a) (CWA §§ 301(a) and 404(a)). The Act defines "navigable waters" simply as "waters of the United States." 33 U.S.C. § 1362(5)-(7). Although the CWA does not mention "wetlands" in any relevant provision, federal agencies have defined "waters of the United States" to include wetlands the "use, degradation or destruction of which could affect interstate or foreign commerce" or any wetland "adjacent" to a tributary of a "navigable water." 33 C.F.R. § 328.3(a). In this case, the government and the courts have determined that these regulations authorize federal regulation over any wetland with a "hydrological connection" to a navigable water. *See* Apps. A and B.

The District Court Decision

The United States brought this action for injunctive and monetary relief in the district court for the Western District of Wisconsin approximately two years after the Corps served cease and desist orders on Gerke and Mr. Thorson. *See* Appellant's Br. at 5. The United States argued before the district court that Gerke had violated the CWA by piling excavated material on and adding sand to the site. These actions, the government asserted, constituted the discharge of a pollutant into a "navigable water" of the United States. On the government's motion for summary judgment, the district court found for the United States.

The central issue before the district court was, whether the property qualifies as a navigable water within the meaning of the CWA and, if so, whether Congress can regulate the land as part of its Commerce Clause power over the Nation's navigable waters. *See* App. at B-18 to B-31. The Corps has interpreted the CWA to extend to wetlands "adjacent to" any tributary of a navigable water, *see* 33 C.F.R. § 328.3(a)(7), and has defined "adjacent" to mean "bordering, contiguous or neighboring," *id.* § 328.3(c). Thus, the precise jurisdictional question was whether the wetlands in question are "adjacent" to "waters of the United States." *See* App. at B-19. The district court read this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), not to require that the wetlands actually abut a navigable water to be considered "adjacent." *See* App. at B-25. Instead, the court held that a surface hydrological connection is sufficient to establish the requisite "significant nexus" and to show that the wetlands are "inseparably bound up" with jurisdictional "waters of the United States." The court concluded that the wetlands were adjacent to waters of the United States because the wetlands at issue were hydrologically connected to the Wisconsin River, a navigable-in-fact watercourse. The court considered its analysis proper under *SWANCC* because the hydrological

connection rule uses a navigable waterbody as a reference point, whereas the migratory bird rule overturned in *SWANCC* had no connection to navigable waters. *Id.* at B-24. The court declined to read the Corps's regulation narrowly to avoid any question of unconstitutionality because it found the government's regulation of the land at issue to fall comfortably within Congress's Commerce Clause power over the channels of commerce. *Id.* at B-28 to B-30.

The Seventh Circuit Opinion

On appeal, Gerke argued that the district court erred in finding (1) the land in question to be subject to the CWA, and (2) finding that federal regulation of the land was within Congress's Commerce Clause power. The panel deemed the two points to be so interrelated as to merit a single analysis. *United States v. Gerke Excavating, Inc.*, 412 F.3d at 806, App. A at A-3. Thus, the panel addressed the constitutional question directly.

The court began its discussion of the constitutional question by stating the well-established rule that "Congress can regulate waterways used to transport people and goods in interstate or foreign commerce." *Id.*, App. at A-3. Next, the court, citing such precedents as *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942), noted that the constitutional analysis does not turn on whether the filling of the land in question can have a demonstrable effect on interstate commerce—for the "sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect." *Id.*, App. at A-4. Whether Gerke's activities had an effect on the navigability of waters of the United States was not important, the court concluded, because "[i]n fact navigability is a red herring from the standpoint of constitutionality." *Id.* at 807, App. at A-5. In essence, the court

found that federal power over the Nation's waterways extends beyond the protection of navigation. The court concluded that

> it doesn't matter whether the objection to allowing the Gerkes of this world to dry out wetlands is that the effect may be to reduce water levels in navigable waterways to the point at which navigation would be affected or that the effect may be to increase the level of pollution in such waters by reducing the supply of unpolluted wetlands water,

because if the water flows into a navigable waterway, the source of that water includes "waters of the United States" under the CWA. *Id.* at 807, App. at A-5 to A-6.

The court also rejected Gerke's argument that extending federal power over the land in question would result in an unwarranted restriction of the traditional regulatory powers of the states. That argument, in the court's mind, was "two-edged," for the "more extensive the wetlands, the greater their potential importance as a source of water to keep the navigable waterways full and clean." *Id.*, App. at A-6. The court conceded, however, that some wetlands, though extensive, might be unconnected to navigable waters and therefore out of the CWA's reach. The court found such an example of isolated wetlands in *SWANCC*.

Lastly, the panel rebuffed Gerke's argument that *SWANCC* permits CWA jurisdiction over nonnavigable waters only where such waters actually abut a navigable-in-fact watercourse. To support its position, Gerke pointed to that part of this Court's *SWANCC* opinion stating that the CWA does not cover "ponds that are *not* adjacent to open water," *SWANCC*, 531 U.S. at 168. The panel was not convinced, however, and instead distinguished *SWANCC* on the ground that the case dealt with wetlands "completely isolated from any navigable waterway, tributary, etc." *Gerke*, 412 F.3d at 808, App. at A-6. Abutment cannot be the legally significant criterion, the panel

reasoned, because such a test would produce the supposedly absurd result of excepting from CWA jurisdiction wetlands not abutting a navigable waterway yet connected "by a pipe two feet long." *Id.*, App. at A-7. The panel also considered "adjacency" and "open water" to have more flexible meanings than Gerke was willing to concede: "'adjacent' can just mean 'connected,' and 'open water' can just mean water that is part of the waters of the United States because it flows into navigable waterways." *Id.*, App. at A-7.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL JURISDICTION UNDER SECTION 404 OF THE CLEAN WATER ACT EXTENDS TO INTRASTATE, NONNAVIGABLE WETLANDS THAT DO NOT ABUT A TRADITIONAL NAVIGABLE WATER

The Seventh Circuit's decision below adds to the dispute among the federal courts of appeals concerning the extent of federal power under the CWA. With this Court's recent grant of certiorari in the consolidated cases of *Rapanos* and *Carabell v. United States Army Corps of Engineers*, 04-1384, the same issues raised in this case merit the Court's attention. Necessarily, the discordant decisions of the lower courts call for the harmonizing hand of this Court's review.

On one side of the ledger of the "circuit split" are the Fourth, Sixth, Seventh, and Ninth Circuits. Cases from these circuits support the proposition that CWA jurisdiction can be established with the existence of a surface hydrological connection between a wetland and a navigable water. On the

other side is the Fifth Circuit. That Circuit's definitive statement of CWA jurisdiction is found in *In re Needham*, 354 F.3d 340 (5th Cir. 2003). But to put that case in context, a look at *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is instructive. In *Rice*, an action was brought against Harken Exploration Company under the Oil Pollution Act (OPA) for oil spills on Rice's property in Hutchinson County, Texas. Among other things, the OPA imposes strict liability on parties responsible for discharging oil into "navigable waters," defined as "waters of the United States." *Id.* at 266-67. The scope of the OPA was an issue of first impression for the Fifth Circuit and required the court to define "navigable waters." *Id.* at 267.

Because only a few cases had construed the OPA, the court turned to the cases interpreting the term "navigable waters" under the Clean Water Act. The Fifth Circuit determined that the legislative history and the use of identical definitions of "navigable waters" in the OPA and CWA suggested that Congress intended the term to "have the same meaning" in both Acts. *Id.*

The Fifth Circuit began its analysis with *United States v. Riverside Bayview Homes*, 474 U.S. 121, noting that this Court had adopted an expansive reading of "navigable waters" which the Fifth Circuit had previously followed in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). *Rice*, 250 F.3d at 268. But the court concluded its analysis with *SWANCC*, stating that this Court had more recently "limited the scope of the CWA." *Id.*

The Fifth Circuit observed that in *SWANCC* this Court had "distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable," and that the term "navigable waters" had to have some effect. *Id.* Based on its reading of *SWANCC*, therefore, the Fifth Circuit declined to

characterize a small seasonal creek as "waters of the United States" subject to federal regulation under either the OPA or CWA, even though the creek flowed intermittently into the Canadian River, a "navigable water." "Instead," the court held, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

More recently, the Fifth Circuit affirmed its holding in *Rice* and rejected the interpretation of CWA jurisdiction which the Seventh Circuit applied in this case. In the case of *In re Needham*, the Fifth Circuit was again required to determine the scope of "navigable waters" under the Oil Pollution Act and, as in *Rice*, the Fifth Circuit relied on *SWANCC* for this determination. *See In re Needham*, 354 F.3d at 344-47.

In *In re Needham*, as in this case, the government argued that the definition of navigable waters "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.' " *Id.* at 345. The Fifth Circuit acknowledged some support for this view. At least two appellate courts had agreed with this interpretation: *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) ("assert[ing] authority, under the CWA, over wetlands that are 'adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay' "), and the Sixth Circuit in the *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003), criminal case ("asserting authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river"). *In re Needham*, 354 F.3d at 345.

But the Fifth Circuit expressly rejected this interpretation, stating unequivocally that the government's definition of navigable waters "is unsustainable" under *SWANCC*. *Id.* So as not to be misunderstood, the court stated further that the CWA

and OPA are not so broad as to permit federal regulation of "tributaries" that are neither navigable in fact nor adjacent to such waters. *Id.* The court thus held:

> Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under [*SWANCC*] "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Id. at 345-46 (citing *Rice*, 250 F.3d at 269).

The views of the other circuits are represented in the following noteworthy cases: *United States v. Rapanos*, 339 F.3d at 453 (finding that *SWANCC* merely invalidated the "Migratory Bird Rule"), *cert. granted*, 533 U.S. 913 (2001); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407, 415 (4th Cir. 2003) (noting that *SWANCC* reaffirmed a broad reading of CWA jurisdiction); *United States v. Deaton*, 332 F.3d at 702 (holding that *SWANCC* did not disavow any Corps interpretations of the CWA, except the "Migratory Bird Rule"); *United States v. Rueth Development Co.*, 335 F.3d 598, 604 (7th Cir. 2003), *cert. denied* (finding *SWANCC* did not significantly limit the government's wetland jurisdiction); *Baccarat Fremont Developers, LLC v. United States Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005) ("*SWANCC* . . . did not address the Corps' adjacency jurisdiction"); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001) (expressing the view that *SWANCC* did not change the conclusion that waters flowing into navigable waters are jurisdictional).

The conflict among the circuits is real and substantial and involves an important question of law. To resolve the conflict, this Court should grant the petition.

II

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE EXTENSION OF CLEAN WATER ACT JURISDICTION TO EVERY INTRASTATE WETLAND WITH ANY SORT OF HYDROLOGICAL CONNECTION TO NAVIGABLE WATERS, NO MATTER HOW TENUOUS OR REMOTE THE CONNECTION, EXCEEDS CONGRESS' CONSTITUTIONAL POWER TO REGULATE COMMERCE AMONG THE STATES

In *SWANCC*, this Court stated that the word "navigable" constrains the jurisdictional reach of the Clean Water Act. Otherwise, " 'the use of the word navigable in the statute . . . does not have any independent significance.' " *SWANCC*, 531 U.S. at 172 (citation omitted). Accordingly, this Court found: "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*

Besides the Act's express language, this Court gave another reason for limiting section 404(a) to Congress' traditional power over navigable waters and refusing to hold, as the government urged, that federal jurisdiction extends to waters that do not abut an open body of navigable water; namely, the government's application of its CWA regulations to nonnavigable, isolated, intrastate waters was a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends" and thus "raises significant constitutional questions." *Id.* at 173-74.

Likewise, in this case, federal regulation of nonnavigable, nonadjacent, intrastate wetlands, approved by the court below, raises "significant constitutional questions." In the Seventh

Circuit, jurisdictional wetlands are defined by any hydrological connection to navigable waters:

> Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are "waters of the United States" within the meaning of the Act.

Gerke, 412 F.3d at 807 (App. at A-6).

Therefore, under this decision, CWA jurisdiction extends to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection. This is evidenced by the facts of this case. The intrastate wetlands that are the focus of this dispute are not navigable waters. *See* 412 F.3d at 805, App. at A-2; App. at B-12. They do not abut a navigable water. *See* App. at B-3 to B-4. They have only an intermittent, indirect, and remote surface runoff connection to the nearest navigable waters. *See id.* at B-4.

In *SWANCC*, the government argued that the CWA granted it authority to regulate "nonnavigable, isolated, intrastate" waters. 531 U.S. at 172. This Court, however, determined that the government's interpretation of the statute invoked "the outer limits of Congress' power" and could not be sustained. *Id.*

> Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

Id. at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

The constitutional problem was the government's claim that it could regulate any waters usable by migratory birds under "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." *SWANCC*, 531 U.S. at 173. This Court was clearly skeptical of that argument and, to underscore the point, cited its Commerce Clause decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), stating: "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173.

Evidently, because the regulation of nonnavigable, isolated, intrastate waters implied unlimited administrative authority in the federal government, well beyond the power of Congress to regulate, this Court was unwilling to read such authority into the CWA. But the government's assertion of authority over any wetland with a hydrological connection to a navigable water in this case implies essentially the same limitless power as the "Migratory Bird Rule" and is likewise invalid.

Both the district court and the Seventh Circuit reasoned that federal jurisdiction over the property in question was constitutionally justifiable under the "channels of commerce" prong of the Commerce Clause power. *See* App. at B-27 to B-30; *Gerke*, 412 F.3d at 806, App. at A-3 to A-4. This determination is incorrect. The CWA was enacted pursuant to the federal government's authority over navigable waters, *SWANCC*, 531 U.S. at 172, but the navigability power[2] under the Commerce Clause has never been used to regulate activities that *may affect* the channels of commerce, as opposed to activities occurring in the channels of commerce or goods

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[2] A "spur" of the "channels of commerce" prong of the Commerce Clause power. *See United States v. Appalachian Power Co.*, 311 U.S. 377, 426-27 (1940).

flowing through the same. This distinction is critical because the Court previously determined that Congress has a near "police power" over the channels of interstate commerce. *Hoke v. United States*, 227 U.S. 308, 323 (1913); *see Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (Congress "has extensive authority" over waters of United States). Although the Court has described Congress's "substantially affects" power under the Commerce Clause in broad terms, *see Perez v. United States*, 402 U.S. 146, 154-57 (1971) (implying that Congress may regulate criminal conduct connected with interstate felonious conduct); *Wickard*, 317 U.S. at 125 (approving federal regulation of activities having a substantial effect on interstate commerce regardless of whether the effect was direct or indirect); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (acknowledging a plenary power to enact "all appropriate legislation" concerning those activities having a substantial relation to interstate commerce), it has never conceded a "police power" over these activities. *Cf. Morrison*, 529 U.S. at 608; *Lopez*, 514 U.S. at 556-57; *Raich*, 125 S. Ct. at 2215-16 (Scalia, J., concurring) (noting that Congress's "substantially affects" Commerce Clause power depends upon and is restricted by the Necessary and Proper Clause).

That the regulation of the property in question cannot be justified under the "channels of commerce" power is ably shown by this Court's leading "channels" precedents. In *Caminetti v. United States*, 242 U.S. 470 (1917), this Court upheld the constitutionality of the Mann Act because it regulated the knowing transportation of persons in interstate commerce for immoral purposes, *id.* at 491—in other words, the Act regulated the channels of commerce by excluding particular items (or persons) from those channels. But according to the lower courts here, the government would have the power, under the Commerce Clause, to regulate not just immoral conduct occurring in interstate channels, or persons

and things coincident to immoral conduct passing through those channels, but also conduct, persons, and things that substantially affect the channels of commerce. *Caminetti* does not support such an expansive interpretation. Similarly, in *The Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903), the Court upheld the 1895 Lottery Suppression Act on the grounds that lottery tickets are subjects of commerce, *id.* at 354, and that Congress may constitutionally regulate the channels of interstate commerce by excluding particular items, such as lottery tickets, *id.* at 363-64. *The Lottery Case* does not support the proposition that Congress may regulate activities having a substantial effect on the channels of interstate commerce as a channels regulation. Rather, the nub of both *Caminetti* and *The Lottery Case* is that Congress may regulate interstate commerce channels directly by excluding persons or things from the flow of traffic. It would be a profound misreading of these precedents to conflate the "substantially affects" prong with the "channels of interstate commerce" prong of the Commerce Clause power. Yet that is the very interpretive error made by the lower courts in this case. By analyzing the question according to the "channels of commerce" framework, the district court and the Seventh Circuit have unwittingly conceded to Congress a scope of power over the Nation's waters that this Court has heretofore declined to afford.

The wetlands that Gerke "filled" are not navigable; therefore, the appropriate constitutional rubric under which the jurisdictional question must be analyzed is the "substantially affects"—not the "channels of commerce"—prong of the Commerce Clause power. In *Lopez*, as subsequently affirmed in *Morrison*, this Court set forth a simple standard for analyzing Commerce Clause enactments that are based on the regulation of activities that substantially affect interstate commerce.

A. Under *Lopez* and *Morrison*, Intrastate Activity May Be Regulated for Its Substantial Effects on Interstate Commerce Only If the Regulated Activity Is Economic in Nature

The Gun-Free School Zones Act of 1990 made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). Lopez, a 12th-grade student, was arrested and charged under this Act when he brought a concealed .38 caliber handgun and five bullets to school. *Lopez*, 514 U.S. at 551. However, Lopez challenged the Act as beyond the commerce power of Congress. *Id.* The Fifth Circuit agreed with Lopez and this Court affirmed. *Id.* at 552.

In *Lopez*, this Court declared the purpose of its inquiry was to determine if Congress intended to regulate commerce and then to ascertain "whether a rationale basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557.

First, this Court turned to the statute itself and found § 922(q), by its own terms, had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. This obvious conclusion was compelled by the express language of the Act which made the mere possession of a firearm in a school zone a crime. It followed, therefore, that the regulated act—the possession of a gun—was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[3] *Id.* at

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[3] This Court's decision last Term in *Raich* illustrates an instance where the regulated act *was* an essential part of a larger economic regulatory scheme involving the entire market in drugs. 125 S. Ct. at 2207, 2209. Obviously, the Clean Water Act is not a regulation of

(continued...)

561. The Court observed that the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id.* Accordingly, § 922(q) could not be sustained under this Court's cases allowing congressional regulation of activities "that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* Interestingly, the Court came to that conclusion even though the possession of a gun involves an item having traveled in commerce.

Second, this Court sought to determine whether § 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id.* For that determination, this Court turned again to the language of the Act and found that it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

Third, because no substantial effect was "visible to the naked eye" in the text of the Act itself, the Court looked to legislative history to locate any express congressional findings demonstrating Congress' belief that the possession of a gun in a school zone substantially affects interstate commerce. *Id.* at 562-63. The Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that § 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime interferes with the national economy in two respects: (1) violent crime

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[3] (...continued)
a market commodity in interstate commerce. Rather, as this Court noted in *SWANCC*, Congress passed the CWA using its "navigability" power under the Commerce Clause. *SWANCC*, 531 U.S. at 172.

increases the cost of insurance throughout the Nation; and (2) violent crime deters people from traveling to unsafe areas. *Id.* at 563-64. The government also argued that guns in school undermine the learning environment, producing less productive citizens, which hurts the national economy, *id.* at 564.

To underscore the inherent limitations on the commerce power, this Court also addressed the implications of these "substantially affects" arguments. Under the government's "costs of crime" argument, Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id.* The Court found that under the government's "national productivity" argument, Congress could regulate anything related to individual economic productivity. *Id.* If these arguments were accepted, the Court would be "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id.* "[D]epending on the level of generality," this Court observed, "any activity can be looked upon as commercial." *Id.* at 565.

This was the flaw in the government's arguments: they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. *Id.* at 567. Although some of this Court's earlier cases leaned in that direction and suggested a possible expansion of the commerce power, this Court set aside § 922(q) as an invalid Commerce Clause enactment and declined in *Lopez* to go any further. *Id.* "To do so," this Court stated, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68 (citations omitted).

As if to demonstrate that *Lopez* was no anomaly, this Court affirmed that opinion five years later in *Morrison*. In

Morrison, Christy Brzonkala brought an action against two university students for rape under § 13981 of the Violence Against Women Act of 1994. That Act provided a federal civil remedy for victims of gender-motivated violence and stated that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). The Act defined gender-motivated crime as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). The district court dismissed the suit because it determined that § 13981 was beyond the powers granted to Congress under the Commerce Clause. The Fourth Circuit, sitting *en banc*, and this Court both affirmed.

Relying on *Lopez*, this Court first determined that the statute, by its terms, had nothing to do with commerce: "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. As a result, this Court held gender-motivated crimes not to be the type of activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id.* at 610-11.

This determination was critical to the outcome of the case. As the Court observed, the noneconomic and criminal nature of the prohibited activity in *Lopez* was central to its decision in that case. *Id.* at 610. But the Court did not stop there. To illustrate further the importance of this factor, this Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate commerce *only* when the regulated activity was economic in nature. *Id.* at 611, 613.

Next, this Court determined that the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce. *Id.* at 613. Rather than limit its reach to a discrete

set of gender-motivated violent crimes that had an explicit connection with or effect on interstate commerce, this Court found § 13981 to be drawn too broadly because it included purely intrastate violent crime, and thus concluded that § 13981 was not adequately tied to interstate commerce. *Id.*

Unlike the situation in *Lopez*, however, this Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614. Among others, those effects included deterring victims from traveling interstate or engaging in interstate business. *Id.* at 615. Diminishing national productivity, increased medical costs, and a decrease in the supply and demand of interstate goods were also cited. *Id.* But this Court did not consider these findings to be sufficient to uphold the Act under the Commerce Clause: " "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not make it so.'" " *Id.* at 614 (citations omitted). That determination, this Court stated, is reserved to the Judicial Branch. *Id.*

Because Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, this Court decided that Congress' findings were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which this Court had already rejected in *Lopez*. *Id.* at 615. This Court was simply unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity's attenuated effects on interstate commerce. *Id.* at 617. Therefore, this Court held that Congress did not have authority under the Commerce Clause to enact § 13981 of the Violence Against Women Act. *Id.* at 619.

B. The Extension of Clean Water Act Jurisdiction over Any Water with a Hydrological Connection to a Navigable Water Fails the *Lopez* Standard for "Substantial Effects"

Both *Lopez* and *Morrison* strongly affirmed that federal power under the Commerce Clause is limited in order to prevent the federal government from becoming a government of general powers, like the states. *Lopez*, 514 U.S. at 559-68; *Morrison*, 529 U.S. at 617-19. These cases prohibit the federal government from regulating noneconomic intrastate activities, like the filling of remote, nonnavigable, intrastate wetlands in this case, that have only an attenuated connection to interstate commerce and obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. A faithful application of the *Lopez* standard to the facts in this case demonstrates that the regulation of Gerke's activities exceeds the commerce power and is invalid.

As expressed by this Court, four factors contributed to its decision in *Lopez*. The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate an economic activity. *See Morrison*, 529 U.S. at 610. The second factor was that the Act contained " 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.' " *Id.* at 611-12 (quoting *Lopez*, 514 U.S. at 562). This factor was important to establish that the Act was in "pursuance of Congress' regulation of interstate commerce." *Id.* at 612. The third factor was that neither the statute" '"nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce"' " of the regulated activity. *Id.* (quoting *Lopez*, 514 U.S. at 560). And, the fourth factor was that the

connection between the regulated activity and a substantial effect on interstate commerce was attenuated. *Id.*

The first factor is the most telling and focuses on the express language of the act. As this Court observed in *Lopez*, "Section 922(q) was a criminal statute that by its terms had nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 560. Under the interpretation offered by the government and accepted by the court below, the CWA fares no better.

The CWA provides that "the discharge of any pollutant by any person shall be unlawful," unless approved by the federal government. 33 U.S.C. § 1311(a) (CWA § 301(a)). The Act provides further that: "The Secretary may issue permits . . . for the discharge of dredged or fill materials into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (CWA § 404(a)). The term "navigable waters" is defined simply as "waters of the United States." 33 U.S.C. § 1362(7) (CWA § 502(7)). Gerke was cited for filling wetlands without a permit, *see* App. at B-1, in violation of § 1319(b) and (d).

Like the statutes in *Lopez* and *Morrison*, the CWA prohibition on the discharge of fill material into navigable waters, by any person, does not, by its terms, have anything to do with commerce or an economic activity or enterprise, however broadly those terms are defined. The prohibition applies to all discharges, whatever the source. Whether the discharge is caused by a child playing with a pail of sand or by the operation of a backhoe, it is the same. The text of the Act gives no indication that Congress intended to regulate commerce by prohibiting discharges to remote wetlands. Under *Lopez* and *Morrison*, this alone is sufficient to invalidate federal regulation of the wetlands in this case: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

Only one exception applies. If the Act does not, by its terms, purport to regulate economic activity, then the provision may be upheld as a proper Commerce Clause enactment if the provision contains an express "jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." *Lopez*, 514 U.S. at 560. This is the second *Lopez* factor. But in this case, the statutory definition of "navigable waters" as "waters of the United States," does not contain any reference to interstate commerce. There is no jurisdictional statement. Moreover, the Seventh Circuit held in this case it is enough if the regulated wetlands have a mere hydrological connection with a navigable water. Therefore, the statutory definition of "navigable waters" in this case suffers from the same problem as the provisions challenged in *Lopez* and *Morrison*; it is too broad and sweeps in waters that have no actual effect on interstate commerce.

The third *Lopez* factor involves a consideration of the legislative history to determine if Congress was pursuing its power to regulate interstate commerce and to allow the court to consider the legislative judgement that the regulated activity substantially affects interstate commerce. *See Morrison*, 529 U.S. at 612. In *SWANCC*, the government argued the legislative history of the CWA supported its view that Congress intended to exercise its commerce power to its full extent. But, this Court disagreed. According to this Court, the legislative history does not indicate that Congress intended to exercise any Commerce Clause authority over remote wetlands:

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92- 1236, p. 144 (1972), U.S. Code Cong. &

> Admin.News 1972 pp. 3668, 3822, neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous.

SWANCC, 531 U.S. at 168 n.3.

As in *Lopez*, neither the statute nor the legislative history contains "express congressional findings regarding the effects upon interstate commerce" of the filing of remote, intrastate wetlands. *See Morrison*, 529 U.S. at 612.

The fourth and final *Lopez* factor involves a determination as to whether the regulated activity is so removed from any substantial impact on interstate commerce that to allow such regulation would obliterate the distinction between what is national and what is local. *Id.* at 614-15. This determination appears to be forgone when the court finds the other three factors do not support the enactment, as here.

In this case, neither the statutory definition of "navigable waters" nor the prohibition on discharges to "navigable waters" without a permit has, by its terms, anything to do with economic activity and there is no express jurisdictional element to limit the Act to a "discrete set of [discharges] that additionally have an explicit connection with or effect on interstate commerce" as the *Lopez* standard requires. *Lopez*, 514 U.S. at 560. There are also no express findings in the legislative history to support the regulation of remote, intrastate wetlands as a regulation of commerce. These factors suggest that the connection to interstate commerce is attenuated and that no "rational basis existed for concluding that [the] regulated activity sufficiently affected interstate commerce." *Id.* at 554. Moreover, it is axiomatic that to allow federal regulation of any water that has a mere hydrological connection to a navigable water would "completely obliterate the Constitution's

distinction between national and local authority." *Morrison*, 529 U.S. at 615. So long as a federal permit is required to fill such waters, the federal government has a virtual veto power over local land and water use. If the federal government can regulate all waters hydrologically connected to a navigable water, no matter how tenuous or remote the connection, there is virtually nothing that the government could not regulate under the Commerce Clause.

Analyzed under the "substantially affects" criterion, the regulation of the filling of remote, nonnavigable, intrastate wetlands utterly fails as a valid exercise of the Commerce Clause power. The decision below must be overturned.

CONCLUSION

This Court has already granted certiorari in *Rapanos* and *Carabell*. The issues presented by Gerke and decided by the Seventh Circuit are identical to those presented in *Rapanos* and are related to the issues presented in *Carabell*. Thus, Supreme Court review of the Gerke case will promote judicial efficiency by directly resolving the common legal issues in *Gerke*, *Rapanos*, and *Carabell*. This alone is strong enough reason to justify review of Gerke's petition. But there is more. Review by this Court will resolve the split among the Circuits regarding the extent of CWA jurisdiction. This case raises a question of immense federal importance—the scope of federal authority over "waters of the United States"—upon which the lower courts are divided. Whereas the Fourth, Sixth, Seventh, and Ninth Circuits have broadly interpreted the CWA to cover all waters with a hydrological connection to a navigable water, no matter how tenuous or remote the connection, the Fifth Circuit has expressly rejected that interpretation as "unsustainable" under this Court's precedents.

For these reasons, this Court should grant Gerke's petition for a Writ of Certiorari.

DATED: November, 2005.

Respectfully submitted,

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APPENDIX

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In the
United States Court of Appeals
for the Seventh Circuit

No. 04-3941

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERKE EXCAVATING, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 03-C-0074-C—**Barbara B. Crabb**, *Chief Judge.*

Argued May 9, 2005—Decided June 21, 2005

Before POSNER, EASTERBROOK, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge.* This suit charges that the defendant violated the Clean Water Act by discharging pollutants into navigable waters from "point sources" without the permit from the Corps of Engineers that is required when the pollutant consists of dredge or fill material (otherwise the permit must be sought from the EPA or, in some cases, a state). 33 U.S.C. §§ 1311(a), 1362(12). The district judge granted summary judgment for the government and imposed a civil penalty of $55,000 on the defendant.

The Clean Water Act defines "navigable waters" as "waters of the United States." *Id.* § 1362(7). A regulation defines the latter term to include not only waters "susceptible to use in interstate or foreign commerce," which are "navigable waters" in the usual sense, but also tributaries of such waters and—of particular pertinence to this case—"wetlands adjacent to" such waters *or to such tributaries*. 33 C.F.R. §§ 328.3(a)(1), (5), (7). (That is the Corps' regulation; the EPA's, 40 C.F.R. §§ 230.3(s)(1), (5), (7), is identical.)

The defendant dumped dredged stumps and roots, plus sand-based fill (all conceded to be pollutants within the meaning of the Act, 33 U.S.C. § 1362(6); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814-15 (9th Cir. 2001); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999)), into a patch of what it concedes are wetlands within the meaning of the regulation. It also concedes that the means of the dumping—bulldozers and dump trucks—are "point sources." 33 U.S.C. § 1362(14); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, *supra*, 261 F.3d at 815; *United States v. Pozsgai*, 999 F.2d 719, 726 n. 6 (3d Cir. 1993); *Avoyettes Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

Located on a 5.8 acre tract near Tomah, Wisconsin, that the owner wanted to develop, the wetlands are drained by a ditch that runs into a nonnavigable creek that runs into the nonnavigable Lemonweir River which in turn runs into the Wisconsin River, which is navigable. The Lemonweir River is thus a tributary of a navigable river, but are the wetlands "adjacent" to the Lemonweir? They are connected to it in the sense that water from the wetlands flows into the river, but they might be thought "adjacent" not to the river but merely to the ditch, and a ditch is not what one would ordinarily understand as a "tributary." The Wisconsin River, because it flows into the

Mississippi, is connected to the Gulf of Mexico, but it would be odd to describe it as "adjacent" to the gulf.

Gerke, however, does not argue that the regulation is inapplicable to this case, and would not get far with the argument because of how the regulation has been interpreted—as treating a ditch connected to a tributary of a navigable waterway as a tributary of a tributary, *e.g.*, *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704, 708-09 (6th Cir. 2004); *United States v. Deaton*, 332 F.3d 698, 704 (4th Cir. 2003), just as the Lemonweir River itself is a tributary of a tributary of the Mississippi River. A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its manmade counterpart.

Gerke argues instead that the regulation exceeds the authority granted the Corps of Engineers by the Clean Water Act because the wetlands are not "waters of the United States," or, if the regulation is within the congressional grant of authority, then it exceeds the authority that the commerce clause of the Constitution grants Congress. The arguments are interchangeable, since the only reason Gerke gives to doubt the validity of the regulation is the principle that the meaning of a statute or a regulation can be stretched where that is necessary to avoid its being held unconstitutional. The idea here would be that the Corps of Engineers would prefer a bobtailed regulation to none if that is the choice forced on it by the Constitution.

Congress can regulate waterways used to transport people and goods in interstate or foreign commerce. *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979); *United States v. Rands*, 389 U.S. 121, 122-23 (1967); *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-97 (1824). Those are the

waterways that the term "navigable waters" conventionally denotes (though a river could be navigable even though it was entirely within one state). The Wisconsin River, not to mention the Mississippi River into which it flows, is a navigable waterway in the conventional sense. The most elementary type of federal regulation of Such Waterways that the commerce clause authorizes is regulation aimed at making sure they remain navigable, in the sense of usable in interstate or foreign commerce, rather than allowing them to become obstructed by low-lying bridges, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), or to become too shallow for navigation by large vessels because the sources of their water are being diminished by dams, silting, or real estate development. There are believed to be more than 100 million acres of wetlands in the lower 48 states, Thomas E. Dahl, "Status and Trends of Wetlands in the Conterminous United States 1986 to 1997" 9 (U.S. Fish & Wildlife Service 2000), and they supply some of the water in navigable waterways. Ralph W. Tiner, "Correlating Enhanced National Wetlands Inventory Data with Wetland Functions for Watershed Assessments: A Rationale for Northeastern U.S. Wetlands" 6-7 (U.S. Fish & Wildlife Service 2003). Also, by temporarily storing storm water, wetlands reduce flooding, which can interfere with navigation. Office of Technology Assessment, U.S. Congress, "Wetlands: Their Use and Regulation" 43-47 (1984).

Obviously, filling in a 5.8 acre tract (not all of it wetlands—we do not know how much of it is) is not going to have a measurable effect on the depth of the Wisconsin or Mississippi Rivers. But that cannot be the test. The sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect. *See, e.g., Gonzales v. Raich*, 125 S. Ct. 2195, 2205-07 (2005); *Wickard v. Fillburn*, 317 U.S. 111,

118-29 (1942); *United States v. Hicks*, 106 F.3d 187, 188-90 (7th Cir. 1997); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997), and, with specific reference to the regulation of navigable waters, *United States v. Deaton*, *supra*, 332 F.3d at 706-07; *cf. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941).

Congress's power to regulate commerce is not limited to removing obstructions; otherwise it could not forbid trafficking in controlled substances, a program designed to reduce a form of commerce. Congress may forbid the pollution of navigable waters even if the pollution has no effect on navigability, which is the usual case, though we've found a couple of cases in which pollution did impede navigability. *Kernan v. American Dredging Co.*, 355 U.S. 426, 427-28 (1958); *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). In fact navigability is a red herring from the standpoint of constitutionality. The power of Congress to regulate pollution is not limited to polluted navigable waters; the pollution of groundwater, for example, is regulated by federal law, *e.g.*, 42 U.S.C. §§ 300h, 6949a(c), 9621(d)(2)(B)(ii), because of its effects on agriculture and other industries whose output is shipped across state lines, and such regulation has been held to be authorized by the commerce clause. *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 202-03 (2d Cir. 2002); *United States v. Olin Corp.*, 107 F.3d 1506, 1510-11 (11th Cir. 1997); *cf. Allied Local & Regional Mfrs. Caucus v. United States EPA*, 215 F.3d 61, 81-83 (D.C. Cir. 2000). In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-66 (7th Cir. 1994), we noted that in excluding groundwater from the definition of "waters of the United States," Congress in the Clean Water Act had declined to exercise its constitutional power to the utmost.

So it doesn't matter whether the objection to allowing the Gerkes of this world to dry out wetlands is that the effect may be to reduce water levels in navigable waterways to the point at

which navigation would be affected or that the effect may be to increase the level of pollution in such waters by reducing the supply of unpolluted wetlands water. Nothing in the Constitution forbids interpreting the Clean Water Act to cover any wetlands that are connected to navigable waters. Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are "waters of the United States" within the meaning of the Act. *United States v. Rapanos*, 339 F.3d 447, 450-53 (6th Cir. 2003); *United States v. Deaton*, *supra*, 332 F.3d at 704-12.

Gerke argues that the wetlands of the United States are so extensive that the Corps' interpretation will tilt the balance between federal and state power too far in the direction of the federal government. *In re Needham*, 354 F.3d 340, 344-46 (5th Cir. 2003); *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 267-69 (5th Cir. 2001). Gerke reminds us of recent decisions by the Supreme Court which hold that the commerce power is not plenary, such as *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). The argument, however, is two-edged. The more extensive a wetlands, the greater its potential importance as a source of water to keep the navigable waterways full and clean.

Granted, a wetlands could be extensive yet not be a source of water for navigable waterways. In a decision about wetlands that are isolated from navigable waterways, the Supreme Court held in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), that such wetlands are not "waters of the United States." Gerke fastens on the sentence in the opinion that states that the Clean Water Act does not extend "to ponds that are *not* adjacent to open water." *Id.* at 168 (emphasis in original). It is dangerous, however, to take judicial language out of context; the case was about a pond that was completely isolated from any navigable waterway, tributary, etc. As we noted in United

States v. Rueth Development Co., 335 F.3d 598, 603-04 (7th Cir. 2003), *SWANCC* did not overrule *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which had held that a wetlands that actually abutted a navigable waterway was constitutionally regulable. It cannot make any difference if instead of abutting, the wetlands is connected to the waterway by a pipe two feet long. Even taken out of context, the sentence Gerke fastens on doesn't do the work it thinks it does. For "adjacent" can just mean "connected," and "open water" can just mean water that is part of the waters of the United States because it flows into navigable waterways.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B–1

Filed Apr. 7, 2004

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER THORSON, MANAGED INVESTMENTS INC., CONSTRUCTION MANAGEMENT, INC. and GERKE EXCAVATING INC.,

Defendants.

OPINION AND ORDER

03-C-0074-C

This is a civil action for injunctive and monetary relief in which the United States contends that defendants Peter Thorson, Managed Investments, Inc., Construction Management, Inc. and Gerke Excavating, Inc. violated 33 U.S.C. § 1319(b) and (d) of the Clean Water Act by discharging pollutants into waters of the United States without a permit. Plaintiff asks the court to (1) permanently enjoin defendants from discharging pollutants into the waters of the United States without a permit; (2) require defendants to remedy the damage caused by their unlawful activities at their own expense; and (3) impose civil penalties pursuant to 33 U.S.C. § 1319(d). Defendants have asserted a counterclaim, in which they seek a declaratory judgment that the site of the discharge (1) does not meet the necessary criteria for wetlands set out in the United

States Army Corps of Engineers "Wetlands Delineation manual" and (2) is not subject to jurisdiction under the Clean Water Act. The case is before the court on plaintiff's motion for partial summary judgment. Jurisdiction is present. 28 U.S.C. § 1331.

Plaintiff's motion for partial summary judgment will be granted with respect to defendants Thorson, Managed Investments and Gerke Excavating. Plaintiff has proved that these defendants discharged pollutants into the waters of the United States. Defendant has not shown why the court should not give deference to the Army Corps of Engineers's standards for wetlands, including wetland hydrology. It was proper for plaintiff to rely on that method in determining that the site constitutes a wetland. Further, the clear statutory text of the Clean Water Act is not violated by the Corps's regulation, which applies to wetlands adjacent to tributaries of navigable waters. Finally, I reject defendants' argument that the regulation exceeds congressional authority under the commerce clause of the United States Constitution. Congressional authority to regulate channels of interstate commerce extends beyond the regulation of those activities affecting a channel's suitability for transporting goods and persons.

Plaintiff is not entitled to summary judgment with respect to defendant Construction Management. Although plaintiff bears the burden of proof, it has not proposed any facts showing defendant Construction Management's involvement in the discharge. At most, the evidence shows that defendant Construction Management submitted a permit application for a building project on the site two years before the acts that gave rise to this lawsuit.

Defendants are not saved by any of the four affirmative defenses they pursue. They contend that plaintiff has failed to state a claim on which relief may be granted, but the contention

is not meritorious. Defendants' last three "affirmative defenses" are not true affirmative defenses; they simply restate defendants' denial of the underlying violation. Finally, defendants' counterclaim seeking a declaration that the site is not a "water of the United States" will be dismissed with respect to the filled portion of the site. In determining that plaintiff is entitled to summary judgment, I have already concluded that the site of the discharge is a "water of the United States." However, the claim survives this motion to the extent that defendants seek a declaration regarding the status of the unfilled portions of the site. The Administrative Procedure Act allows persons aggrieved by agency actions to sue for non-monetary relief and the Corps has not made a fact-specific determination of its jurisdiction over the entire site.

From the parties proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff is the United States of America. Defendant Managed Investments, Inc. is a real estate development corporation. Defendant Construction Management, Inc. is a general contracting and development corporation. Defendant Thorson is the president of both defendant Managed Investments and Construction Management. Defendant Gerke is an excavating corporation. All defendants are located in Tomah, Wisconsin or reside there.

A. The Site

The incidents giving rise to this cause of action took place on an undeveloped 5.8 acre tract of land owned by defendant Managed Investments in Tomah, Wisconsin. The eastern border of the tract abuts Superior Avenue; Jefferson Street runs along the tract's southern border. A private residential driveway runs along the north side; the western border abuts a drainage ditch, which runs to Deer Creek, which flows from

west to east approximately seventy-five feet north of the residential driveway. Deer Creek is a soft water, alkaline, clear stream that flows into the south fork of the Lemonweir River.

B. Application for Permit to Fill Site

Under the Clean Water Act, the Army Corps of Engineers is authorized to regulate the disposal of dredged and fill material into the waters of the United States. In 1999, the Corps made a preliminary determination that the site at issue was within its jurisdiction under the Act. The drainage ditch, Deer Creek and the south fork of the Lemonweir River are all part of the Mississippi River's surface water tributary system. The Lemonweir River flows into the Wisconsin River, which is used in interstate commerce and is navigable in fact from Tomahawk, Wisconsin, down to its confluence with the Mississippi River near Prairie du Chien, Wisconsin. The Mississippi River is navigable in fact and used in interstate commerce. The residential driveway on the northern edge of the site is not a barrier to surface water flow from the site to Deer Creek because of two culverts, one on each end of the driveway.

On February 10, 1999, George Schleicher, the owner of the lot at the time, received a letter from the Corps advising him that part of the site was covered in wetlands that could not be manipulated without first obtaining a permit. On or about February 18, 1999, defendant Managed Investments submitted to plaintiff a joint state and federal application for water quality certification, a copy of which was received by the Wisconsin Department of Natural Resources on February 22, 1999. The application included a letter from Schleicher, stating that defendant Managed Investments had offered to purchase the lot if the Corps and the department would issue permits approving the proposed plan to fill parts of the site. In the application, defendant Managed Investment described its plan to construct a retail and service business complex. The department's fee

application was signed by defendant Thorson and dated February 19, 1999.

By letter dated April 9, 1999, defendant Managed Investments' agent, Lawrence Feddersen, revised the plans for the site because of certain water quality concerns raised by the Corps and the Wisconsin Department of Natural Resources. At some point that same month, defendant Thorson hired an outside consultant, Ayres Associates, to assist with the permit application. On or about April 23, 1999, Ayres Associates sent a letter to the Wisconsin Department of Natural Resources, asking that defendant Construction Management be substituted for defendant Managed Investments as the permit applicant. In the letter, Ayres provided additional environmental information about the site, including a delineation of the plants, soils and hydrology.

On May 24, 1999, the Wisconsin Department of Natural Resources denied water quality certification because defendant Construction Management had not provided reasonable assurance that the project would comply with wetland quality standards. On June 8, 1999, the Corps followed the lead of the Wisconsin Department of Natural Resources and denied the application without prejudice. Defendant Construction Management petitioned the Wisconsin Department of Natural Resources for a contested case hearing on June 22, 1999, but sent the petition to the wrong location and did not discover the error until the time for filing had expired. On January 12, 2000, after the petition was routed to the proper office, the department denied the request because it had not been filed within the requisite time period or at the proper location.

C. Development of the Site

In January 2001, the United States Supreme Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). The Corps had defined its jurisdiction under the Clean Water

Act to regulate the discharge of pollutants into "navigable waters" as extending to intrastate waters that provide habitat for migratory birds. In invalidating this regulation, the Court made it clear that isolated intrastate waters cannot be subject to the Corps's jurisdiction under the Act. After learning of this decision, defendant Thorson, acting in his capacity as president of defendant Managed Investments, offered to purchase the site for the reduced price of $55,000 from Schleicher, who accepted. (The original offer price in 1999 had been $80,000). In February 2001, defendant Thorson contacted Bruce Norton, a biologist and the Corps's initial point of contact in Monroe County, Wisconsin. Norton expressed his understanding that the wetlands on the site were "adjacent" to Deer Creek under the Corps's definition of that term so that defendant Thorson would need a permit for any mechanized clearing of the wetlands. Defendant Thorson did not apply for a permit after having this conversation with Norton.

In February or March 2001, defendant Thorson hired contractor defendant Gerke Excavating to place fill material and perform other grading activities on the site. At some point in March, defendant Thorson contacted defendant Gerke's president and project coordinator to tell them to go ahead with the project even without permits because of a recent United States Supreme Court opinion. Defendant Thorson gave them a two-week time frame in which to complete the project. On March 23, 2001, the parties officially entered into an agreement for performance of these grading services.

On March 27,2001, defendant Gerke removed stumps and topsoil and began to fill and grade the site with a sand-based fill product. Defendant used a bulldozer and trucks to haul material and a broom to keep fill material off the road. That same day, defendant Thorson attempted unsuccessfully to contact Norton at his office. He then contacted the Corps's district office, seeking a jurisdictional determination whether the wetlands on the site were "adjacent" to waters within the Corps's

jurisdiction. The regional officer told defendant Thorson that the site could be filled if it were actually isolated, but the officer did not make any final determination that the wetlands on the site were either "adjacent" to navigable waters or isolated. Later in the day, defendant Thorson left Norton a voicemail message indicating that he believed that his site was isolated because of the advice he had received from the regional officer and that he would proceed to fill the site.

After receiving defendant Thorson's voicemail message the following morning, Norton attempted to reach him without success. Norton learned from a Tomah city official that the city had "red flagged" the project because defendant Thorson had not obtained the necessary city permits and that defendant Gerke had been hired to perform the work. Norton then contacted Ron Parish of defendant Gerke Excavating and asked him whether he was aware of the wetland issues in the project. Parish told Norton that defendant Thorson had said that he had taken care of everything and that defendant Gerke had started work on the project the previous morning (March 27, 2001). Norton told Parish that he would need a permit to fill the wetlands and advised him of the penalties for filling the site without one. Parish agreed to stop work at the site. At some time on March 28, 2001, defendant Gerke and defendant Thorson executed a written contract for the excavation and filling services. (it is unclear whether the contract was executed before or after the conversation between Norton and Parish or the conversation between Norton and defendant Thorson.) The contract includes the following clause: "Gerke Excavating, Inc. will not bear responsibility for any fines or penalties assessed by government agencies for any reason prior to completion, owner shall pay for all work completed." Later that day, defendant Thorson contacted Norton and accused him of threatening defendant Gerke and forcing a work stoppage. Norton informed defendant Thorson that the Corps was preparing a cease and desist order.

On March 28, 2001, the Corps issued cease and desist orders to defendants Thorson, Construction Management and Gerke. At the site the following day, Norton hand-delivered the orders to defendant Thorson and defendant Gerke's president, Richard Gerke. In response, defendant Thorson and Gerke indicated that no filling had taken place after Norton's phone calls the day before. By this time, dredged stumps, roots and other spoil material was piled on the west, north, east and southeast of the fill area. These piles remain on the site.

D. Ecological Conditions on the Site

The Corps's 1987 wetland delineation manual lays out three wetland criteria: wetland hydrology (soil saturation), wetland soil (hydric soil) and wetland vegetation (hydrophytes). According to the manual, an area must satisfy all three criteria in order to qualify as wetlands. The manual provides various methods and standards for determining whether these criteria are satisfied. Recent disturbances or normal seasonal variations may create atypical situations in which one or more of the three criteria may be lacking or obscured.

Obligate wetland plants are those found in wetlands more than 99% of the time, faculative wetland plants are those found in wetlands between 67-99% of the time, and faculative plants are those found in wetlands between 33-67% of the time. According to the 1987 manual, the hydrophytic vegetation criterion is met when more than 50% of the plant species in an area fall into these three categories. The hydrophytic vegetation requirement was met at 28 of the 34 sample points on the site at issue.

Hydric soils are those formed under conditions of saturation, flooding or ponding for periods long enough to create anaerobic conditions during the growing season. The anaerobic conditions cause changes in soil elements, such as iron and manganese, producing soil colors and other characteristics that indicate hydric soils. Hydric soils were

found at 23 of the 24 sample points surrounding the fill area and at all six sample points beneath the fill.

The wetland hydrology criteria is satisfied if the soil is saturated "within a major portion of the root zone (usually within 12 inches of the surface)" for at least 5% of the growing season. The 1987 manual provides that the starting and ending dates of the growing season may be estimated from air temperatures over a ten-year span. Specifically, the last and first date on which the air temperature reaches 28° Fahrenheit or lower five years out of ten mark the start and end of the growing season. Applying this method, the estimated start and end dates of the growing season at the site are April 29 and October 5 respectively. This is a 159-day period, 5% of which is 8 days. At all six locations tested, the soil was saturated to within 12 inches from the surface for more than 8 days during the estimated growing season in 2003.

(I note that plaintiff has proposed voluminous additional scientific data that would tend to show that the soil hydrology criteria have been satisfied under one of the other methods outlined in the manual. However, in its brief in support of its motion for summary judgment, plaintiff relies exclusively on the 12 inch soil saturation method described above. *See* Plt. Br., dkt. # 77, at 14-15. Thus, these other data are immaterial for purposes of resolving this motion.)

OPINION

The Clean Water Act makes it unlawful for any person to discharge a "pollutant" from a "point source" into "navigable waters" unless the discharge is authorized by a permit or an exemption. 33 U.S.C. §1311(a); 33 U.S.C. § 1362(12); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 612 (7th Cir. 2003). The Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33

U.S.C. § 1251(a). Congress has charged the Army Corps of Engineers with regulating the permit process under § 404 of the Act. 33 U.S.C. § 1344; *Home Builders*, 335 F.3d at 612. Individual permits are issued on a case-by-case basis after the Corps conducts site specific examination, provides an opportunity for a public hearing and public interest review and makes a formal determination. 33 C.F.R. §§ 320.4, 323. *See also Home Builders*, 335 F.3d at 612. The Corps may not issue a § 404 permit unless an applicant has first obtained certification or waiver from the state in which the discharge originates, indicating that the activity will not damage water quality impermissibly. *See* 33 U.S.C. § 1341(a).

§ 309 of the Act authorizes civil actions for "appropriate relief, including a permanent or temporary injunction" for violations of § 301. 33 U.S.C. § 1319(b). In addition, the Act authorizes district courts to impose civil penalties, not to exceed $25,000 a day for each violation. 33 U.S.C. § 1319 (d). A plaintiff must prove that the defendants (1) discharged a "pollutant" (2) from a "point source" (3) into "navigable waters." 33 U.S.C. § 1311. If a plaintiff proves these three elements, the defendants' actions constitute a § 301 violation unless authorized by a permit. In this case, defendants concede that they did not have a permit for their activities.

A. Discharge of a Pollutant

Defendants do not deny that their actions constitute a discharge of a "pollutant," which is defined under the Act to include dredged spoil, solid waste, rock and sand. 33 U.S.C. § 1362(6). Defendant Gerke piled dredged stumps, roots and spoil on the site. In addition, defendant deposited sandy fill material that it had trucked in and began grading portions of the site.

Although defendants do not raise the issue, it is not clear from the facts proposed by plaintiff how the discharge can be attributed to defendant Construction Management. The

discharge can be attributed to defendant Managed Investments because it owns the site, defendant Thorson because he directed and oversaw the discharge and defendant Gerke because it did the discharging. *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D. W.Va. 1996) ("The CWA imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work.") At most, the facts show that defendant Construction Management was the substituted named applicant for a building permit at the site approximately two years before the discharge. Although plaintiff proposes extensive facts about defendant Thorson's role in arranging for the discharge, there is no indication that he was acting in his capacity as defendant Construction Management's president at the time. Absent any other information about the involvement, I cannot conclude that plaintiff has proved the discharge element with respect to defendant Construction Management, notwithstanding defendants' failure to raise this issue. Plaintiff bears the burden of proving a violation. It has not met this burden with respect to defendant Construction Management. (Throughout the remainder of the opinion, the term "defendants" will refer to defendants Thorson, Managed Investments and Gerke).

B. From a Point Source

Defendants concede that the discharge was made from a point source. A "point source" is "any discernible, defined and discrete conveyance" 33 U.S.C. § 1362(14). Bulldozers, tractors, backhoes and dump trucks qualify as "point sources." *United States v. Pozsgai*, 999 F.2d 719,726 n.6 (3d Cir. 1993) ("Courts have consistently held that dump trucks and bulldozers.., qualify as 'point sources.'") (citations omitted); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) (bulldozers, tractors and backhoes); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes). Defendants used trucks to haul fill material to the

site and bulldozers to push dredged materials into piles. Thus, the point source element is satisfied.

C. Navigable Waters

The primary debate in this case is whether the filled portions of the site constitute "navigable waters" under the Act. Congress defined the term "navigable waters" to mean "the waters of the United States." Initially, the Corps construed the Act to cover only waters that were navigable in fact. *Riverside Bayview*, 474 U.S. at 123. In 1975, it redefined the term to extend to the non-navigable tributaries of those waters and to the freshwater wetlands adjacent to other covered waters. *Id.* In *Riverside Bayview*, 474 U.S. 121, the Supreme Court found, in light of the statute's language, purpose and history, that the"waters of the United States" could be construed reasonably to include certain wetlands, even though wetlands are not navigable in the traditional sense. *Id.* There are two primary disputes: first, does the filled portion of the site qualify as a wetland and second, if it does, are the wetlands subject to jurisdiction under the Act?

1. Status as a wetland

"The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.4(b). The Corps uses three physical characteristics to determine the existence of a wetland: (1) hydrophytic vegetation; (2) hydric soil; and (3) wetland hydrology. Waterways Experiment Station, Department of the Army, Corps of Engineers Wetlands Delineation manual (1987).

Defendants do not deny that the hydrophytic vegetation criteria has been met or that the site meets the hydric soil criteria. Their only challenge is to plaintiff's conclusion that

the site's hydrology is that of a wetland. As to this conclusion, they do not challenge the accuracy of plaintiff's data supporting its visual observation under the soil saturation method of determining a site's hydrology. Instead, they argue that their expert's "transpiration" theory is a better method of determining hydrology. Plaintiff makes a number of objections to the evidence on which defendants rely, pointing out that defendants did not reveal their expert's method until they filed their brief in opposition to plaintiff's motion for partial summary judgment and arguing that the expert's theory flunks the *Daubert* test. It is not necessary to address these points. However valid defendant's expert opinions are, they do not establish that the Corps's method of determining hydrology is "plainly erroneous."

The 1987 manual lists several methods for determining an area's hydrology, ranking them by reliability. *Id.* at 31-34. The most dependable method is using recorded data on water levels, flooding, and soil saturation followed by field data. *Id.* at 31-32. Among the various methods for establishing wetland hydrology using field data, "visual observation of soil saturation" is listed in the manual as the second most reliable. *Id.* at 32. Using this method, the wetland hydrology criterion is satisfied if the soil is saturated "within a major portion of the root zone (usually within 12 inches of the surface)" for at least 5% of the growing season. *Id.* at 30-32.

The relevant issue is whether defendants' expert's testimony is sufficient to overcome the presumption that agency standards and measures are appropriate. As a general matter, regulations of an agency charged with enforcing a statute are entitled to deference when there is no clear statutory language on point. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). In applying deference under *Chevron*, courts are to apply an agency's interpretations unless they are unreasonable. *Id.* However, "'interpretations such as those in opinion letters—like interpretations contained

in policy statements, *agency manuals*, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.'" *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (quoting *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000)) (emphasis added). Plaintiff has not demonstrated that the manual has been subjected to the rigorous review normally required in formal agency rule making. *See* 5 U.S.C. § 553 (Administrative Procedure Act provision mandating notice, comment and consideration in agency rule making). *See also Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guideline not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference") (internal quotation marks omitted)).

However, even when *Chevron* deference is not warranted, agency interpretations may be entitled to some degree of deference. *Matz v. Household International Tax Reduction Investment Plan*, 265 F.3d 572,574 (2001). Under *Auer v. Robbins*, 519 U.S. 452 (1997), an agency's interpretation of its own regulations is entitled to a relatively high level of deference. *Christensen*, 529 U.S. at 588. A court must accept the interpretation unless it is "'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). (Although the Court of Appeals for the Seventh Circuit has noted the unliklihood of giving deference to an agency's interpretation of its own regulation contained only in a brief, *Keys*, 347 F.3d at 993, plaintiff's temperature-based method has been published in the Corps's Delineation Manual for approximately ten years.)

In a case involving a nearly identical issue, the Court of Appeals for the Fourth Circuit applied a relatively high level of deference to the 1987 manual. In *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), the defendants in a § 301 civil action challenged the 1987 manual's method for establishing soil

hydrology. The defendants argued that soil must be saturated to the surface and not merely within twelve inches of the surface for 5% of the growing season in order to establish the requisite hydrology. *Id.* at 712-13. The court rejected this argument, noting that "[i]f the [defendants] want to argue that the 'within twelve inches' criterion is inappropriate, they must argue that the manual is a *flawed* interpretation of the regulation defining wetlands." *Id.* at 173. The court reasoned that it was bound to defer to the manual interpretation, particularly because it deals in a complex scientific field, unless defendants gave it reason to believe the manual to be "'plainly erroneous or inconsistent with' the regulatory definition of wetlands." *Id.* (citing *Bowles*, 325 U.S. at 413-14).

In essence, defendants argue that their expert's transpiration method determines the actual onset of the growing season with greater accuracy than plaintiff's temperature method. *See* Dfts.' Br., dkt., 90, at 27 ("The *more appropriate* method for determining when the growing season commenced in a particular year is to examine the data that shows when the plants actually began to grow."). The most critical remark their expert makes in his affidavit is characterizing as "arbitrary" the results of the temperature-based method. However, he fails to identify any arbitrariness beyond that inherent in any estimation. He does not assert that the onset of warmer air and ground temperatures does not correlate with the start of plant growth or that the 28° Fahrenheit cut-off point is somehow inappropriate. Even if I were to assume that defendant's expert is correct when he says that his method results in a more accurate estimation of the growing season, his testimony does not show that the Corps's interpretation is "plainly erroneous."

Defendants do not address the issue of deference. They seem to assume that none is due. Their approach would burden courts with evaluating competing scientific methods, a practice that courts are not qualified to perform. *Pauley BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (deference particularly

appropriate when agency administers "complex and highly technical regulatory program."), if a court were to disregard the scientific standards set by the agency charged with enforcing an Act whenever it found another standard more appropriate, it would effectively usurp the agency's expressly delegated authority, violating fundamental separation of powers principles. *See id.* ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.")

Defendants argue that the hydrology requirement cannot be met because of the developments around the site, such as road construction and accompanying drainage ditches (all prior to 2001), which prevent ground water flow to the site from surrounding areas. This argument is a *non sequitur*. It is not logically sound to argue that soil saturation measurements are inaccurate or misleading because saturation levels may have been higher in the past. Part of the confusion may have been caused by defendants' overly broad reading of their expert's testimony at his deposition, where he states that "because of these modifications, *local soil survey data* should not be used as *a secondary indicator* of wetlands hydrology." Straw Dep., dkt. #93, at ¶ 23, p. 7-8 (emphasis added). Plaintiff is not relying on such data as a secondary indicator. It relies exclusively on the *primary indicator* of "visual observation of soil saturation" for purposes of summary judgment. *See* Plt.'s Br., dkt. #77, at 14-15. It is immaterial that plaintiff collected and submitted data that could be used to establish hydrology using some other method, such as local soil surveys. In the portion of the affidavit defendants cite in support of their argument, their expert does not suggest that the site modifications have any bearing on the reliability of visual observation of soil saturation data on which plaintiff is relying.

Defendants raise two other objections to plaintiff's method of determining hydrology. The first focuses on soil

saturation. They assert that the soil must be saturated to the surface rather than within twelve inches of the surface for 5% of the growing season. The entirety of their argument is as follows:

> In its analysis, the Corps appeared to have taken the position that the 1987 manual mandates the usage of "a major portion of the root zone" (usually 12 inches). It does not! This reading of the 1987 manual is incorrect. Instead, the 1987 manual provides for six field hydrologic indicators, which can be used to assess the criterion of hydrology. The 'root zone' language falls under paragraph 2 of the "Field Data Section" of the 1987 manual where there is a description of what to do when engaging in visual observation of soil saturation. It states, "For soil saturation to impact vegetation, it must occur within a major portion of the root zone (usually within 12 inches of the surface) of the prevalent vegetation."

Dfts.' Br., dkt. #90, at 28-29. I cannot understand why defendant are arguing that the twelve-inch standard should apply only to the visual observation method described in subsection two when plaintiff does not contend that it should apply to any other method. Plaintiff is relying on the subsection two visual observation method; thus, application of the twelve inch standard is appropriate. A nearly identical challenge was raised and rejected in *Deaton*, 332 F.3d at 713, in which the court noted that "[t]he 'within twelve inches' indicator is spelled out in the manual."

Finally, defendants challenge plaintiff's "reliance" on reed canary grass as a secondary indicator of wetland hydrology. Plaintiff has never suggested that it relied on reed canary grass as a secondary indicator of wetland hydrology at the site. Plt.'s Br., dkt. # 77, at 14. To the extent that plaintiff cites other

secondary indicators of hydrology, it is barred from relying on them because it did not refer to them until its reply brief. Arguments made for the first time in a reply brief are waived. *Nelson v. La Crosse County Dist. Atty. (State of Wisconsin)*, 301 F.3d 820, 836 (7th Cir. 2002).

2. Adjacency.

Although I conclude that the site in this case qualifies as a "wetland," this is not the end of the inquiry. Not every "wetland" is subject to regulation under the Clean Water Act. 33 C.F.R. § 328.3 (1993) (only interstate wetlands and those wetlands adjacent to other covered waters are subject to Act). The Corps's regulations define the waters subject to jurisdiction under the Act as including:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (I) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> . . .
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> . . .
>
> (7) Wetlands adiacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Id. "Adjacent" is defined to mean "bordering, contiguous or neighboring." 33 C.F.R. § 328.4©.

Plaintiff argues that defendants' wetlands are subject to the Act because they are adjacent to a drainage ditch running to Deer Creek, a tributary flowing into the south fork of the Lemonweir River, which is a tributary of the Wisconsin River, which is navigable in fact and is used in interstate commerce and a tributary of the Mississippi River, which is also a navigable in fact interstate waterway used for interstate commerce. In short, plaintiff contends that the wetlands are subject to the Act because they are hydrologically connected to other covered waters. *See* Plt.'s Br., dkt. # 77, at 15. Defendants raise three arguments in opposition: (1) the text of the Act is clear in limiting jurisdiction to only those wetlands *immediately* adjacent to waters that are navigable in fact; (2) even if the regulation is warranted under the statutory text, the regulation should be disregarded because it raises serious constitutional questions; and (3) if the Act does permit plaintiff's hydrological connection standard, it exceeds Congress's authority under the commerce clause. For the reasons stated below, I do not find defendants' arguments convincing and I find that the adjacency element has been satisfied.

a) "Adjacency" under the statutory text

Defendants argue that plaintiff has exceeded its authority under the Clean Water Act in extending the Act's coverage to include wetlands that are not immediately adjacent to waters that are actually navigable. They note that the Corps is charged with regulating the discharge of fill material into "navigable waters" and argue that extending coverage to wetlands with only a hydrological adjacency to traditionally navigable waters is unwarranted jurisdictional bootstrapping. Defendants argue that this conclusion is mandated by the Supreme Court's holding in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and its later ruling in *SWANCC*, 531 U.S. 159.

As defendants note, Congress charged the Corps with regulating discharges of fill material in "navigable waters," 33 U.S.C. § 1344(a), but "navigable waters" is defined in the Act as "the waters of the United States," 33 U.S.C. § 1362(7). In Riverside Bayview, 474 U.S. 121, a unanimous Court held that in light of the Act's policies, language and legislative history, it was reasonable to construe "waters of the United States" to extend to at least some wetlands, even though they were not navigable in fact. *Id.* at 131-35. The Court observed that the Act was part of a "comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 132 (quoting 33 U.S.C. § 1251). It noted Congress's recognition that "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for 'water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-33 (quoting S. Rep. No. 92-414, p. 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

Next, the Court reasoned that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of *limited import*." *Id.* at 133 (emphasis added). Finally, the Court

concluded that Congress had acquiesced in the administrative construction. *Id.* at 136. After the wetlands regulation was adopted, critics introduced a House Bill that would have limited the Act's coverage to waters navigable in fact. *Id.* (citing H.R. 3199, 95th Cong., 1st Sess., § 16 (1977)). Although the bill passed in the House, it was defeated after a lengthy debate in the Senate. *Id.* at 136-37. The effort to narrow the definition of "navigable" under the Act was finally defeated when the Conference Committee adopted the Senate's approach. *Id.* at 137 (citing 123 Cong. Rec. 39209 (1977)). Accordingly, the Court concluded, "a definition of the 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'" *Id.* at 135.

In *SWANCC*, 531 U.S. at 167-72, the Court addressed another regulation interpreting "waters of the United States" as including any water used as a habitat by migratory birds, even if it was otherwise wholly isolated. The Court invalidated the so-called "Migratory Bird Rule" because it would have had the effect of reading the word "navigable" out of the statute entirely. *Id.* It reasoned:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import" and went on to hold that § 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever.

Id. at 172.

Courts are split over the question whether the inevitable conclusion of *SWANCC* is that the Act's coverage extends only

to those wetlands immediately adjacent to navigable waters or whether a surface level hydrological connection may be sufficient. Recently, the United States Supreme Court has denied three petitions for certiorari addressing this issue. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, __ U.S. __, 2004 WL 71792 (Apr. 5, 2004) (No. 03-701); *United States v. Rapanos*, 339 F.3d 447,453 (6th Cir. 2003), *cert. denied*, __ U.S. __, 2004 WL 717207 (Apr. 5, 2004) (No. 03-929); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, __ U.S. __, 2004 WL 71790 (Apr. 5, 2004) (No. 03-637).

The Court of Appeals for the Fifth Circuit has held the "any hydrological connection" standard to be unsustainable after *SWANCC*. *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (*Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)). *See also FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp. 2d 509, 516 (D. N.J. 2003) (holding that *SWANCC* barred hydrologic standard). The Court of Appeals for the Fifth Circuit reads *SWANCC* as holding that the Act's coverage extends to only those wetlands that are "truly adjacent" to navigable waters. *In re Needham*, 354 F.3d at 345-46 ("under *SWANCC* 'a body of water is subject to regulation if the body of water is actually navigable or adjacent to an open body of water'") (quoting *Rice*, 250 F.3d at 269).

In *Deaton*, 332 F.3d 698, the Court of Appeals for the Fourth Circuit upheld adjacency jurisdiction over wetlands connected to the navigable waters of the Chesapeake Bay through a "winding thirty-two mile path." *Id.* at 702. The Court of Appeals for the Sixth Circuit has also upheld the hydrological-based definition of adjacency. *Rapanos*, 339 F.3d at 453. In doing so, the court relied heavily on the reasoning in *Deaton*. *Id.* at 452. A majority of district courts addressing the issue have construed *SWANCC* more narrowly than the Court of Appeals for the Fifth Circuit. *See North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC.*, 278 F. Supp.

2d 654, 671 (E.D.N.C. 2003) (finding the reasoning in *Deaton* persuasive on "adjacency" issue); *Northern California River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502, at *9 (N.D. Cal. Jan. 23, 2004) ("the Ninth Circuit seems to have read *SWANCC* as only invalidating the migratory-bird rule as applied to isolated waters") (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001)); *American Canoe Ass'n, Inc. v. District of Columbia Water and Sewer Authority*, 2004 WL 385660, at *8 (D. D.C. 2004) ("However, *SWANCC* did not purport to reinterpret the general scope of the CWA. Rather, the Court found that a rule promulgated by the Army Corps specifically exceeded the scope of 33 U.S.C. § 1344(a)."); *United States v. Jones*, 267 F. Supp. 2d 1349, 1360 (M.D. Ga. 2003) ("a complete reading of *SWANCC* reveals that the Supreme Court actually had no intention of defining 'navigable waters' as narrowly as courts have done in cases such as *Needham* and *F D & P Enterprises*."); *United States v. Interstate General Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001) (rejecting defendants' invitation to read *SWANCC* to restrict wetlands covered by Act to those immediately adjacent to traditionally navigable waters and holding that because Court reviewed only migratory bird rule in *SWANCC*, it is improper to extend ruling further).

Although the Court of Appeals for the Seventh Circuit has not ruled on the issue, it has indicated its understanding that the opinion in *SWANCC* did not even address the adjacency issue, let alone decide it. *United States v. Rueth Development Co.*, 335 F.3d 598, 604 (7th Cir. 2003) (defendant's argument that its wetland's connection to navigable waters was too attenuated because connection ran through series of tributaries "simply raises the question of what 'adjacency' means, *which SWANCC did not address at all*") (emphasis added). The court cited with approval the Fourth Circuit's ruling in *Deaton*, 332 F.3d 698. *Rueth*, 335 F.3d at 604.

As defendants note, *Rueth* did not involve an enforcement action under the Clean Water Act, but the enforcement of a consent decree, under which the defendants conceded that their wetlands were subject to jurisdiction under the Act. Although the court's statements about adjacency in *Rueth* were dicta and therefore not binding, I agree that the reasoning in *Deaton* (and *Rapanos*) is persuasive and that *SWANCC* does not forclose the hydrological connection standard for determining adjacency.

"[*SWANCC*], of course, emphasizes that the Clean Water Act is based on Congress' power over navigable waters, suggesting that covered non-navigable waters are those with some connection to navigable ones." *Rapanos*, 339 F.3d at 452 (quoting *Deaton*, 332 F.3d at 709) (internal punctuation omitted). *See also* Dfts.' Br., dkt #90, at 11 (noting the Court's observation in *SWANCC*, 531 U.S. at 172, that "navigable" had "at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been made navigable in fact or which could reasonably be so made.") Unlike the "migratory bird rule," however, the regulation in this case uses waters that are traditionally navigable as its reference point. 33 C.F.R. § 328.3(7). The regulation subjects wetlands to coverage under the Act *because* of their connection with waters that are navigable in fact. Far from reading the word "navigable" out of the statute entirely, as the migratory bird rule would have done, traditionally navigable waters are the starting point for determining whether a wetland is subject to jurisdiction under the regulation at issue in this case. Thus, the textual concerns guiding the Court's opinion in *SWANCC* are not implicated.

In concluding that *SWANCC* requires immediate adjacency with waters that are navigable in fact, the Court of Appeals for the Fifth Circuit relies on the following language from that opinion: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to

ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." *Rice*, 250 F.3d at 269 (quoting *SWANCC*, 531 U.S. at 168). The court appears to have assumed that immediacy was implied in the word "adjacent" and that navigability was implied in the phrase "open waters." Defendants highlight three passages from the portion of the *SWANCC* opinion summarizing the Court's earlier holding in *Riverside Bayview* in support of this narrow reading of the word "adjacent": The Court noted in *SWANCC* that (1) the specific wetlands involved in Riverside Bayview "*actually* abutted on a navigable waterway;" (2) the Court found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably bound up* with the waters of the United States'"; and (3) that it was the "*significant nexus* between wetlands and 'navigable waters' that informed [its] reading of the [Clean Water Act]." *See* Dfts.' Br., dkt. #90, at 11-12; *SWANCC*, 531 U.S. at 167 (citing and quoting *Riverside Bayview*, 474 U.S. at 134).

The "actually abutted" language simply recounts the specific factual circumstances in *Riverside Bayview*, 474 U.S. at 135. Defendants attempt to read an actual abutment requirement into the Riverside Bayview, but the Court declined expressly to decide whether adjacency was required in that case. *Id.* at 131, n.8. Moreover, the Court used the "inseparably bound up" and "significant nexus" language to refer to the hydrological connection between wetlands and adjacent waterways. *See id.* at 134 (wetlands and adjacent waters "inseparably bound up" when part of the same aquatic system). Even if these phrases did not refer to an aquatic connection, I am not persuaded that in summarizing an earlier holding in which the adjacency issue was avoided expressly, the Court has somehow not only addressed the matter but decided what "adjacency" means.

Moreover, I see no need to read the term "open waters" as meaning waters that are navigable in fact. The term "open waters" is not defined in *SWANCC*, *Riverside Bayview*, or in the regulations construing the Act. However, in *Riverside Bayview*, the Court observed that "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not *wholly aquatic* but nevertheless fall far short of being dry land." *Id.* at 132 (emphasis added). Certainly, not every wholly aquatic body of water is navigable in fact. Further, in reiterating the importance of the "significant nexus" found in *Riverside Bayview*, the Court placed "navigable waters" in quotation marks, indicating that it was likely referring to the phrase's statutory meaning. *SWANCC*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading . . . ."). Accordingly, I disagree with defendants that under the statutory text in light of the Court's ruling in *SWANCC*, it was impermissible for the Corps to assert jurisdiction over wetlands adjacent to tributaries of traditionally navigable waters.

b) Adjacency under the commerce clause

Defendants' last two arguments are interrelated. Defendants invoke the principle that courts must disregard agency regulations pushing the outer limits of congressional authority unless Congress has expressed its clear intent. In addition, they argue that the Clean Water Act exceeds Congress's authority under the commerce clause if it is construed to extend to wetlands adjacent only to the non-navigable tributaries of traditionally navigable waters. Specifically, defendants argue that congressional authority to regulate the channels of interstate commerce "may only be exercised over activities that affect a water's susceptibility to use as a channel of interstate commerce." Dfts.' Br., dkt. #90, at 17. They say they have a heightened concern that the regulation exceeds congressional authority because the regulation would disrupt the federal-state framework by

usurping local land use planning authority over millions of acres. Dfts.' Br., dkt #90, at 16. As the Court of Appeals for the Seventh Circuit has noted, an Act does not violate the Tenth Amendment's reservation of non-enumerated powers to the states if it reflects a valid exercise of Congress's authority to regulate interstate commerce. *Gillespie v. City of Indianapolis*, 185 F.3d 693,706 (7th Cir. 1999) (citing *New York v. United States*, 505 U.S. 144, 156 (1992) ("[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States")). Accordingly, both arguments turn on whether the regulation invoked the outer limits of congressional commerce clause authority. Therefore, I will consolidate the discussion.

In *SWANCC*, 531 U.S. at 172-73, the Court referred to the principle against reading federal agency regulations expansively, especially those that encroach upon areas of traditional state power, when it noted that even if it had not found the migratory bird rule to be impermissible under the clear statutory text, it would not have accorded the regulation *Chevron* deference. This principle stems in part from a "prudential desire not to needlessly reach Constitutional issues." *Id.* at 172. The Corps had argued that the migratory bird rule was authorized pursuant to Congress's power to regulate those activities that have a substantial effect on interstate commerce. Because it is unclear that discharging pollutants into isolated waters used as a habitat for migratory birds would have a "substantial affect" on interstate commerce, the Court reasoned that upholding the rule would necessitate constitutional analysis under the framework laid out in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). *SWANCC*, 531 U.S. at 173.

In *Deaton*, 332 F.3d at 705-07, the Court of Appeals for the Fourth Circuit considered a challenge similar to the one raised by defendants. First, the court noted that the reluctance to read regulations expansively applies only when a regulation

in question raises a "grave and doubtful" constitutional question. *Id.* at 705 (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)). *See also SWANCC*, 531 U.S. at 173 ("where an otherwise acceptable construction of a statute would raise *serious* constitutional problems, the Court will construe the statute to avoid such problems . . . .") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568,575 (1988)) (emphasis added). The court went on to hold that this regulation did not raise the kind of serious constitutional issue "'that would lead [it] to assume Congress did not intend to authorize [the regulation's] issuance'" because the regulation fell under Congress's broad authority to regulate the channels of interstate commerce. *Id.* (quoting *Rust*, 500 U.S. at 191). *See also Lopez*, 514 U.S. at 558 (congressional commerce clause authority includes power to regulate channels of interstate commerce, instrumentalities of interstate commerce and those activities having a substantial effect on interstate commerce).

I agree with the Court of Appeals for the Fourth Circuit that Congress's authority to regulate the channels of interstate commerce extends to this regulation subjecting waters to jurisdiction because of their relationship to traditionally navigable waters. *See SWANCC*, 531 U.S. at 172 ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."). Defendants argue, without citing any authority, that the regulation would be impermissible because under Congress's channels power "Congress may only regulate activities that impact a navigable water's suitability to transport goods and persons in interstate commerce." Dfts.' Br., dkt. #90, at 18. (Defendants have cited Calvert G. Chipchase, *The Clean Water Act: What's Commerce Got to Do With It?*, 33 E.L.R. 11075

(2003), for the simple proposition that navigable interstate waters are deemed "channels" because of their capacity to move persons and goods across state and national borders, but this does not support defendants' construction of the extent of Congress's authority to regulate these channels of commerce.)

In arguing that congressional authority to regulate the channels of interstate commerce empowers Congress to regulate only those activities threatening the channel's suitability to transport goods, defendants advocate a construction that contravenes long-standing commerce clause precedent. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained and is no longer open to question." *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (upholding Mann Act which outlawed transporting women across state lines for purpose of making them mistresses even though such activity is non-commercial), *cited with approval in Lopez*, 514 U.S. at 558. *See also United States v. Schaffner*, 258 F.3d 675,680 (7th Cir. 2001) (Congress "may forbid or punish the use of channels to promote dishonesty or the spread of any evil or harm across state lines") (citing *Brooks v. United States*, 267 U.S. 432, 436 (1925)). Other "[e]xamples of activity falling within [the channels] category [] include the shipment of stolen goods, kidnapped persons, prostitutes and guns." *Id.* Just as Congress may regulate the flow of drugs and guns in interstate commerce, it may regulate the flow of pollutants through the channels of interstate commerce, even if the pollutants do not threaten the capacity of the channel to serve as a conduit in interstate commerce.

Defendants suggest that in *Riverview Bayside*, the Court approved the Act's extension of jurisdiction to wetlands immediately adjacent to navigable waters only because of the wetland's "obvious effect" on the navigability of those waters. Dfts.' Br., dkt. #90, at 18. They do not explain how they derived this result from the opinion, but instead quote a passage

indicating the Court's reliance on the Corps's conclusion that pollutant discharges in certain wetlands can harm the "aquatic environment" of navigable waters. *Id.* (citing *Riverview Bayside*, 474 U.S. at 134.) Defendants do not argue that tributaries are incapable of transporting pollutants that could harm an aquatic environment simply because they are not large enough to transport goods and persons. As the Court noted in *Riverside Bayview*, 474 U.S. at 135, n.9,

> [t]hat the [Corp's definition of waters of the United States] may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps's definition is in fact lacking in importance to the aquatic environment—or where it is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

Defendants' unsupported and unprecedented view of Congress's authority to regulate the channels of interstate commerce does not present the kind of grave and serious constitutional question that would prevent a court from giving the Corps's regulation the deference normally accorded to agency interpretations. *See Rust*, 500 U.S. at 191; *Deaton*, 332 F.3d at 705-07 ("The power over navigable waters also carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters."). Moreover, this argument does not provide a sound basis for invalidating the regulation or the Act for exceeding the scope of Congress's commerce clause authority.

Finally, defendants argue that "[e]ven if Congress had enacted the Clean Water Act pursuant to its broader power over activities that 'substantially affect' interstate commerce, federal

jurisdiction in this case would still exceed Congress'[s] commerce power." I need not reach this argument. The Supreme Court has indicated that it believes that the Act was enacted pursuant to Congress's channels of commerce authority, *SWANCC*, 531 U.S. 172.

D. Affirmative Defenses

Plaintiff has proved that without first obtaining a permit, defendants (1) discharged a pollutant; (2) from a point source; (3) into "navigable waters" as that term has been construed permissibly by the agency charged with enforcing the Clean Water Act. Accordingly, plaintiff has established a § 301 violation for which defendants will be held liable unless they can establish that they may avoid liability under an affirmative defense. Defendants Thorson, Managed Investments and Construction Management assert nine "affirmative defenses" in their answer; defendant Gerke Excavating has asserted twelve. (Most of these affirmative defenses overlap.) In their brief in opposition to plaintiffs motion for summary judgment however, defendants discuss only the first four affirmative defenses raised by defendants Thorson, Managed Investments and Construction Management. Defendants' failure to mention the remaining affirmative defenses indicates that they no longer intend to pursue these theories. Accordingly, I will address only those four "affirmative defenses" and the counterclaim and consider the remainder waived. *Dey v. Colt Const. & Development Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (defendant bears burden of persuasion on affirmative defenses).

For their first affirmative defense, defendants allege that plaintiff has not stated a claim on which relief can be granted. Plaintiff argues that this defense has no merit; the complaint alleged facts that if proved would establish a violation of § 301 of the Clean Water Act. Plt.'s Br., dkt. #77, at 20. In response, defendants say only that they have adequately raised the failure to state a claim argument. Dfts.' Br., dkt. #90, at 29-30 (citing

Fed. R. Civ. P. Form 20 for proposition that defendant need only assert that complaint fails to state claim to invoke defense; defendant need not flesh out issue further). Defendants' argument does not respond to plaintiff's charge; a defense is not meritorious simply because it has been asserted adequately. In the complaint, plaintiff alleged that defendants discharged fill material (¶¶ 36, 37) onto the site, which contained wetland (¶ 26) adjacent to the tributaries of navigable waters (¶ 27) and did so without a permit (¶ 38). Compl., dkt. #2, at 5-8. These allegations are sufficient to state a viable claim under § 301 of the Clean Water Act. Therefore, I will dismiss this defense.

As their second, third and fourth "affirmative defenses," defendants assert that "plaintiff improperly applied or has failed to follow its own rules, regulations or guidance," Dfts.' Ans., dkt. #4, at 8; the site is not a "water of the United States"; and the site is not adjacent to a "water of the United States." *Id.* Plaintiff argues that none of these constitutes an affirmative defense. In response, defendants assert that there are disputed material facts governing these affirmative defenses that preclude dismissal. Dfts.' Br., dkt. #90, at 31.

An affirmative defense is "[a] defendant's assertion raising *new facts and arguments* that, if true, will defeat the plaintiff's . . . claim, *even if all of the allegations in the complaint are true*." *Black's Law Dictionary* 430 (7th ed. 1999) (emphasis added). In their second, third and fourth affirmative defenses" defendants merely reiterate their denial of various elements of plaintiffs claim. They have not raised true affirmative defenses. Moreover, I have already concluded that plaintiff properly relied on the methods in the 1987 manual and that the wetlands constitute "waters of the United States" because they are adjacent to traditionally navigable waters. Accordingly, defendants' second, third and fourth "affirmative defenses" will be dismissed.

E. Counterclaim

Finally, defendants assert a counterclaim for a declaratory judgment; they seek a determination that the site does not constitute a "water of the United States" either because it is not a "wetland" under the wetland delineation manual or alternatively, because it is not immediately adjacent to a navigable water. Ans. of Dfts. Thorson, Managed Investments, and Construction Management, dkt. #4, at 9-10; Dft. Gerke's Ans., dkt. #6, at 5-6. Plaintiff seeks dismissal of this counterclaim.

First, plaintiff argues that the issues raised in defendants' counterclaim, at least with respect to the filled portions of the site, must be decided in the course of deciding the summary judgment motion. Plaintiff is correct. Because I have already concluded that the portion of the site in which fill material was deposited is "wetland" under the wetland delineation manual and that it is a "water of the United States" because it is hydrologically connected to navigable waters, defendants will not be entitled to a declaratory judgment with respect to this portion of the site.

However, defendants' counterclaim does not appear to be limited to only those portions of the site in which fill material was deposited. Ans. of Dfts. Thorson, Managed Investments, and Construction Management, dkt. #4, at 9-10; Ans. of Dft. Gerke, dkt. #6, at 5-6. Plaintiff contends that even if defendants counterclaim is not mooted by the court's decision on plaintiff's claim, defendants have failed to identify any waiver of sovereign immunity that would allow them to bring this counterclaim against the United States. Although defendants did not address this issue in their response brief, § 702 of the Administrative Procedure Act waives sovereign immunity for a suit seeking relief other than monetary for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a

relevant statute." 5 U.S.C. § 702. Denial of a § 404(a) permit qualifies as an "agency action" under the Administrative Procedure Act. *See, e.g., SWANCC*, 531 U.S. at 165.

Alternatively, plaintiff argues that to the extent that defendants seek a declaration that the unfilled portion of the site is not a "water of the United States," the counterclaim seeks pre-enforcement review. In support of this argument, plaintiff cites a case in which a party was barred from seeking to enjoin the Army Corps from enforcing a cease-and-desist order. *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 1145 (E.D. Va. 1989). The court reasoned that the claim was an impermissible pre-enforcement action because the enforcing agency had not had a full opportunity to conduct a factual inquiry or make a definitive determination about its jurisdiction over the site. *Id.* at 1147 ("The Court finds, however, that the existence of the Corps' jurisdiction in the case at bar is a factual issue properly left to the expertise of the agency. In the instant case, the Corps should be given the initial opportunity to consider the adjacency issue and develop a record for judicial review."). In that case, however, the Corps's issuance of the order was based on its conclusion that a particular parcel of land *might* be subject to jurisdiction under the Act. *Id.* at 1145. In this case, according to the facts proposed by plaintiff, the Army Corps has already made a fact-specific determination regarding its jurisdiction over the entire site; it denied the 1999 application for development of the site. *See* Plt.'s PFOF ¶ 17 (site is 5.8 acres); ¶ 76 (1999 application "sought approval to fill 5.8 acres"); ¶ 97 (Corps denied application), dkt. #78, at 4, 14 and 18. *Cf. SWANCC*, 531 U.S. 159 (claim challenging Corps's permit denial not regarded as pre-enforcement). Thus, the claim is not an impermissible pre-enforcement action.

Defendants have asserted a claim for declaratory judgment over the entire site. The claim is not barred by sovereign immunity and it does not seem to be a pre-enforcement action. Resolution of plaintiff's motion for summary judgment resolves

this claim only insofar as it extends to the filled portions. Accordingly, the claim survives this motion insofar as defendants seek declaratory judgment regarding Clean Water Act jurisdiction over the non-filled portions of the site. However, defendants should be aware that they will bear the burden of proof at trial on this issue. *E.g. Indianapolis Union Railway, Co. v. Baltimore & O. R. Co.*, 570 F.2d 171,186 (7th Cir. 1978).

ORDER

IT IS ORDERED that

(1) Plaintiff United States of America's motion for partial summary judgment on its claim that defendants violated 33 U.S.C. §131 l(a) of the Clean Water Act is GRANTED with respect to defendants Peter Thorson, Managed Investments, Inc. and Gerke Excavating, Inc.;

(2) Plaintiff's motion for partial summary judgment is DENIED with respect to defendant Construction Management, Inc.;

(3) Defendants' counterclaim for a declaratory judgment is DISMISSED insofar as it seeks a declaration regarding the filled portions of the site; and

(4) This case will proceed to trial on plaintiff's claim under 33 U.S.C. § 131 l(a) against defendant Construction Management and defendants' declaratory action with respect to the non-filled portions of the site.

Entered this 6th day of April, 2004.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Appendix C–1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 17, 2005

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. Frank H. Easterbrook, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 04-3941

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Western District of Wisconsin.
v.	No. 03 C 74
GERKE EXCAVATING, INCORPORATED, Defendant-Appellant.	Barbara B. Crabb, *Chief Judge*.

ORDER

On July 29, 2005 defendant-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

(2)

FILED

JAN 26 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-623

In the Supreme Court of the United States

GERKE EXCAVATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether wetlands that drain into a tributary of traditional navigable waters are part of "the waters of the United States" within the meaning of the Clean Water Act (CWA), 33 U.S.C. 1362(7).

2. Whether application of the CWA to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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In the Supreme Court of the United States

No. 05-623

GERKE EXCAVATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 412 F.3d 804. The opinion of the district court (Pet. App. B1-B35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2005. A petition for rehearing was denied on August 17, 2005 (Pet. App. C1). The petition for a writ of certiorari was filed on November 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566,

33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except pursuant to a permit issued in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). It defines the term "pollutant" to mean, *inter alia*, dredged spoil, rock, sand, and cellar dirt. 33 U.S.C. 1362(6). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The Clean Water Act establishes two complementary permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers (Corps), to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under Section 404(g), the authority to permit certain discharges of dredged or fill material may be assumed by state officials. 33 U.S.C. 1344(g). Pursuant to Section 402 of the CWA, the discharge of pollutants other than dredged or fill material may be authorized by the Environmental Protection Agency (EPA), or by a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program. 33 U.S.C. 1342.

For purposes of the Section 402 and 404 permitting programs, the current EPA and Corps regulations implementing the CWA include substantively equivalent definitions of the term "waters of the United States." The Corps defines that term to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce * * * ;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a); see 40 C.F.R. 230.3(s).*

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* To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the use of the term "navigable waters" to describe

2. This case arises out of a civil enforcement action brought by the United States under the CWA. The government alleged that petitioner and others had violated the CWA by discharging fill material into "the waters of the United States" without a permit. With respect to the government's claim against petitioner, the district court entered summary judgment for the United States. Pet. App. B1-B35.

As the district court explained (see Pet. App. B12), the principal contested issue in the case was whether the area into which petitioner had discharged fill material was part of "the waters of the United States" for purposes of the CWA. The district court first examined the physical characteristics of the area where the discharge had occurred and concluded that it fell within the regulatory definition of "wetlands." *Id.* at B12-B18; see 33 C.F.R. 328.3(b). The court further determined that the wetlands were "adjacent"—defined by the regulations to mean "bordering, contiguous, or neighboring," see 33 C.F.R. 328.3(c)—to tributaries of traditional navigable waters. Pet. App. B18-B26. The court based that conclusion on the government's uncontested allegation that the relevant wetlands "are adjacent to a drainage ditch running to Deer Creek, a tributary flowing into the south fork of the Lemonweir River, which is a tributary of the Wisconsin River, which is navigable in fact and is used in interstate commerce." *Id.* at B19. In light of the hydrologic connection between the wetlands and traditional navigable waters, the district court agreed with the government that petitioner's discharge was covered by the CWA. See *id.* at B19, B24, B25.

---

waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

The district court also held that the application of the CWA to the facts of this case represents a valid exercise of Congress's power under the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3). Pet. App. B26-B31. The court explained that "Congress's authority to regulate the channels of interstate commerce extends to this regulation subjecting waters to jurisdiction because of their relationship to traditionally navigable waters." *Id.* at B28. The court rejected petitioner's contention (*id.* at B26, B29) that Congress's authority in this sphere is limited to the prevention and removal of impediments to navigation. The court noted that Congress has well-established authority "to keep the channels of interstate commerce free from immoral and injurious uses." *Id.* at B29 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)). The court stated that, "[j]ust as Congress may regulate the flow of drugs and guns in interstate commerce, it may regulate the flow of pollutants through the channels of interstate commerce, even if the pollutants do not threaten the capacity of the channel to serve as a conduit in interstate commerce." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A7. The court explained that Congress's power under the Commerce Clause includes the authority to prevent the degradation of traditional navigable waters. *Id.* at A4-A6. The court concluded that, "[w]hether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the [Clean Water] Act." *Id.* at A6.

DISCUSSION

Pursuant to authority conferred by the CWA, the Corps has issued regulations that define the term "waters of the United States" to include, *inter alia*, "[t]ributaries" of traditional navigable waters (33 C.F.R. 328.3(a)(5)) and "[w]etlands adjacent to" such tributaries (33 C.F.R. 328.3(a)(7)). The court of appeals held that those regulations reflect a permissible interpretation of the CWA, and that the application of the Act to the wetlands into which petitioner discharged fill is a valid exercise of congressional power under the Commerce Clause. The court's decision is correct and is consistent with the weight of appellate precedent.

On October 11, 2005, this Court granted petitions for writs of certiorari in *Rapanos* v. *United States*, No. 04-1034, and *Carabell* v. *U.S. Army Corps of Engineers*, No. 04-1384. Those cases, which have been consolidated and set for oral argument on February 21, 2006, also present statutory and constitutional questions concerning the application of the CWA to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. Because the Court's decisions in *Rapanos* and *Carabell* are likely to shed light on the proper disposition of petitioner's challenge to the assertion of federal regulatory jurisdiction here, the petition for a writ of certiorari should be held pending the resolution of those cases. See Pet. 4 n.1.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Rapanos* v. *United States*, No. 04-1034, and *Carabell* v. *U.S. Army Corps of Engineers*, No. 04-1384, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

PAUL D. CLEMENT
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